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Supreme Court, U.S.
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In The

Supreme Court of the United States

WANDA ADAMS, et al.,

Petitioners,

vs.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF THE PETITIONERS

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The respondents in this proceeding are named in the caption.

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INTEREST OF AMICUS CURIAE*

The Academy of Florida Trial Lawyers is a state-wide voluntary association of more than three thousand attorneys whose practices emphasize litigation for the protection of the personal and property rights of individuals. The Academy has a substantial interest in the application of legal standards relating to the rights of individuals. This case involves a significant question regarding the scope of liability under the Age Discrimination in Employment Act.

SUMMARY OF ARGUMENT

The question whether the disparate impact principle applies under the ADEA requires consideration of the amendments to that Act made in the Older Workers Benefits Protection Act of 1990 (OWBPA). These amendments were adopted at a time when this court had denied certiorari in a case challenging the application of the doctrine, (with Justice Rehnquist dissenting from the denial); most Courts of Appeal had upheld the principle; and the EEOC, which has substantive rule-making power under the ADEA, had adopted it by regulation after notice and comment which was entitled to *Chevron* deference.

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Title II of OWBPA addressed the issue of when waivers of ADEA rights by workers would be considered enforceable. Congress recognized that workers subject to a group termination program imposed by the employer were entitled to specific statistics concerning the ages of workers discharged and those who were not. They were given 45 days to consult counsel and consider whether the statistics and other evidence gave rise to a viable ADEA claim. At that point they could waive their ADEA rights and accept the employer's offered settlement, or assert these rights in litigation. Under the disparate impact theory, then considered applicable to the ADEA, the information in these statistics would be very useful. If they suggested disparate impact, and the worker had individualized evidence, an ADEA claim would survive summary judgment. Under these circumstances, the worker and counsel could reasonably assess the viability of the ADEA claim.

Under the disparate treatment theory, worker and counsel could not make such a reasoned judgment because the statistics could not trump the employer's claim of a legitimate reason for the discharge; courts would give summary judgment against workers, who would never have a trial. The statistics required by Congress would not provide worker and counsel with facts to make the kind of judgment for which Congress had provided. To interpose the disparate treatment principle under the ADEA would thus frustrate the Congressional purpose just as the interposition of common law waiver law would have done, had it been allowed, in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

The OWBPA amendment demonstrates that Congress relied on the disparate impact theory when it created these rights. Given the law as it existed at the time, there was no occasion for Congress to "revisit" an apparently settled question. It proceeded directly to resolve an important conflict in a way that balanced the interests of employers and workers. This balance would be disturbed if the disparate treatment concept – which requires an individualized determination – were interposed in a situation where Congress has required that group termination programs be evaluated by their effect on older workers as a group. This is the office of the disparate impact principle.

ARGUMENT

I. The Older Workers Benefit Protection Act of 1990 Incorporated the Disparate Impact Principle into the Age Discrimination in Employment Act of 1967

A. Introduction – A Chronology

The issue in this case is whether the disparate impact principle developed under Title VII of the Civil Rights Act of 1964 (Title VII) applies under the Age Discrimination in Employment Act (ADEA) of 1967 as amended by the Older Workers Benefits Protection Act of 1990 (OWBPA).[1] The District Court held that as a matter of law, disparate impact claims were not cognizable under the ADEA. The Court of Appeals for the 11th Circuit

[1] 29 U.S.C §§ 621-633a as amended by Pub L. 101-433, 101st Cong., Oct. 16, 1990, 29 U.S.C. § 626(f).

agreed.[2] This Court has frequently noted that Title VII and the ADEA are in pari materia.[3] A chronology relating the two statutes on the issue of disparate impact is an important foundation for the analysis of this question.

1964 Title VII of the Civil Rights Act of 1964 passed; defines unlawful employment practice for an employer as:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[4]

Legislative history shows that Title VII was intended to invalidate all race, national origin and sex discrimination. This was made clear in the long debate in the Senate when Sen. McClelland proposed an amendment to include the word "solely" before the phrase "because of

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[2] *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001), *cert. granted*, 122 S.Ct. 643 (Dec. 3, 2001).

[3] *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756-758 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

[4] 42 U.S.C. § 2000e-2(a).

race, color, religion, sex or national origin." That amendment was soundly rejected.[5]

1967 ADEA of 1967 passed: defines unlawful employment practice as:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . .[6]

Legislative history of the ADEA is replete with statements that it was intended to deal with employer actions based "solely" on age. The primary objective of the law was to attack overt age discrimination policies such as mandatory retirement of workers because they had reached a certain age.[7]

Early District Court opinions under Title VII did not address the disparate impact principle.

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[5] Alfred W. Blumrosen. "Interpreting the ADEA: Intent or Impact." pp. 68-112 in Monte B. Lake, ed., *Age Discrimination in Employment Act, a Compliance and Litigation Manual*, Equal Employment Advisory Council (1982).

[6] 29 U.S.C. § 623(a).

[7] *Blumrosen, supra*, note 5.

1971 This Court adopts the disparate impact principle in interpreting Title VII.[8]

1978 EEOC acquires enforcement responsibility for ADEA from Secretary of Labor. Enforcement of ADEA continues to be based on Fair Labor Standards Act procedure that prohibits most unsupervised waivers of FLSA rights.

1981 This court denies certiorari in *Markham v. Geller*, which had adopted the disparate impact principle in an ADEA case.[9] Justice Rehnquist dissents from the denial.

EEOC regulation 29 CFR 1625.7(d) adopts the disparate impact principle under the ADEA. "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as 'reasonable factors other than age' will be scrutinized in accordance with the standards set forth at Part 1607 of this title." The Commentary on the section issued at the time of its adoption, 46 Fed. Reg. 47725 (1981) states that the section, "has been rewritten to make it clear that employment criteria that are age neutral on their face but which nevertheless have a disparate impact on members

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[8] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

[9] 451 U.S. 945 (1981).

of the protected age group must be justified as business necessity. *See Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)."

This regulation was issued after notice and comment procedures. EEOC has substantive rule-making authority under the ADEA.[10] After 1984, Chevron doctrine makes these regulations "binding."[11]

1985 EEOC claims to be unable to supervise ADEA settlement agreements which were, by then, being negotiated not only through the commission, but in private negotiation and litigation. Workers' representatives claimed that unsupervised waivers of ADEA violated Fair Labor Standards Act procedures. EEOC proposes a rule to permit such waivers under certain circumstances.

1986 The Sixth Circuit en banc held that such waivers were valid if "knowing and voluntary."[12]

1987 EEOC adopts a rule permitting unsupervised waivers which were "knowing and voluntary," did not release prospective claims, and were not in exchange for consideration to which the employee was entitled. Such waivers could include claims "of which a signing party had actual knowledge and those which could have been discovered upon reasonable inquiry."[13]

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[10] 29 U.S.C. § 628.

[11] *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[12] *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986).

[13] The Rule, along with the Commission's explanation, appears in 52 Fed. Reg. 32293-96 (Aug. 27, 1987). The rule was

1989 Bills introduced in Congress to permit waivers only where the employee had identified the issues sought to be litigated by filing a charge with EEOC, instituting litigation, or writing a specific complaint to the employer.[14] The rationale was explained in H. Rep. 101-664, 101st Cong., 2d Sess. 22-23 (Aug. 3, 1990). The Report was concerned that

> [E]arly retirees or employees being offered the chance to participate in exit incentive or other group termination programs can effectively be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver. The problem is particularly acute in large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force. The preemptive waiver of rights occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination. Such a preemptive waiver also may preclude the employee from asserting claims that arise out of subsequent discriminatory conduct by the employer, e.g., hiring younger workers to replace the terminated older workers. These waivers are both unfair and inconsistent with the intent of the ADEA.

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twice suspended by riders to appropriation bills. *See* H. Rep. 101-684, 101st Cong., 2d Sess. 20-22 (Aug. 3, 1990).

[14] S. 54, 101st Cong., 1st Sess. 1989.

* * *

> The House and Senate hearing records are replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA. This evidence, although anecdotal, paints a disturbing picture of waiver practices. . . . These workers are given no reason to suspect age discrimination and often are not even aware of their rights under the ADEA. For them, waiving all rights and claims through a general release effectively chills any meaningful inquiry into whether they are the victims of unlawful age discrimination.

This Court decides *Wards Cove Packing Co. v. Atonio*,[15] narrowing the perceived scope of the disparate impact doctrine under Title VII.

1990 The Congressional approach to ADEA waivers changed. The Senate Labor Committee reported a bill which created a new category of employees who were asked to waive rights "in connection with an exit incentive or other group termination program offered to a group or class of employees."[16]

With minor modifications this became ADEA Sec. 626(f)(1)(F)(ii) and (H). These employees were given rights beyond those afforded in individualized separation agreements. The primary right was to receive information concerning the ages and job titles of those "eligible or

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[15] 490 U.S. 642 (1989).

[16] S. Rep. 101-263 on S. 1511, 101st Cong., 2d Sess. (April 5, 1990).

selected for the program" and those "not eligible or selected for the program."[17]

The rationale of the Committee Report was:

> In the context of ADEA waivers, the Committee recognizes a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements are the result of actual or expected adverse action against an individual employee. The employee understands that action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with the employer.
>
> Group terminations and reduction programs stand in stark contrast to the individual separation. . . . The trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee. . . . [T]he terms of the programs generally are not subject to negotiation between the parties. . . . [E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is *not* a function of their individuals status. **Under these circumstances, the need for adequate information and access to advice before waivers are signed is especially acute."** [emphasis added][18]

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[17] 29 U.S.C. § 626(f)(1)(H)(ii).

[18] S. 1511, 101st Cong., 2d Sess. (April 5, 1990), at 32.

The report explained that affected workers were entitled to:

> [D]etailed written information . . . regarding the class of individuals covered by the program, the program's eligibility requirements and any applicable time limits. The employer must include a listing of the job titles and ages of all those individuals eligible or selected for the program, and similar information for individuals who are not eligible. . . .
>
> * * *
>
> The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.[19]

The language of the bill concerning waivers, Title II of the Older Workers Benefit Protection Act, was agreed to by managers of the bill without floor debate. The statement introduced on September 17, 1990, by Committee Chair Metzenbaum, explained the language that was enacted without change:

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[19] *Id.* at 33-34.

The third and final major theme of the legislation is to assure that older workers will not be coerced or manipulated into waiving their rights as a condition of participating in an exit incentive or other group termination program. The assurance is provided through certain requirements that must be met before older workers lawfully may waive their rights under the ADEA. **The most important requirements are that older workers have adequate information about the exit incentive program and that they have the option to seek legal advice as to whether they should waive their rights.** [emphasis added][20]

The OWBPA was enacted.

The Civil Rights Act of 1990 was passed by Congress, reviving the pre-*Wards Cove* disparate impact doctrine. It was vetoed by President Bush.

1991 The Civil Rights Act of 1991 was enacted, "restoring" the disparate impact doctrine to its pre-Wards Cove contours.

1993 *Hazen Paper Co. v. Biggins* decided by this Court.[21] Chief Justice Rehnquist, Justices Kennedy and Thomas concur, noting that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."

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[20] S. 1511, Cong. Rec., Senate, Sept. 17, 1990, p. S 13242, appearing in S. Prt. 102-33, 102nd Cong., 1 Sess., June 1991, Part 1st, p. 157.

[21] 507 U.S. 604 (1993).

B. The Need to Consider Both the ADEA and OWBPA Together to Address the Disparate Impact Concept and the ADEA

When Congress used the language from Title VII in the ADEA of 1967 that would be interpreted in 1971 to include disparate impact, it created a situation ripe with ambiguity because of the differing Congressional perceptions of intent under the two acts. Despite the similarity of language, three Justices have doubted that the original ADEA prohibits disparate impact. That question cannot be resolved without consideration of the 1990 amendments to the ADEA in the Older Workers Benefits Protection Act of 1990.

Two specific issues were addressed in the OWBPA. The first was this court's decision in *Public Employees Retirement System of Ohio v. Betts*.[22] Betts appeared to permit employers to discriminate on the basis of age in connection with fringe benefits. Title I of the OWBPA rejected that concept and broadened the coverage of the original ADEA.

The second issue addressed in Title II of the OWBPA involved the circumstances under which unsupervised waivers would be permitted in ADEA cases. The treatment of that issue, most importantly, the creation of a separate category of employee claims "in connection with an exit incentive or other employee termination program offered to a group or class of employees," directly demonstrates the Congressional view that the disparate impact doctrine is applicable to the ADEA.

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[22] 498 U.S. 963 (1990).

C. The Waiver Provisions in Title II of OWBPA Are Coherent Only on the Assumption That the Disparate Impact Principle Is Applicable to the ADEA

In 1990 Congress amended the ADEA to define the circumstances in which waivers of ADEA Rights would be considered "knowing and voluntary."[23] The Sixth Circuit has summed up the intention of Congress aptly:

> "Congress's intent in enacting § 626 [(f) of the ADEA] was to compel employers to provide data so that an employee considering waiving ADEA rights could assess, with the assistance of counsel, the viability of a potential ADEA claim."[24]

The discharged employee will have six weeks to obtain counsel, and enable counsel to discuss the matter with the employer, evaluate the statistics and other available data and assess the viability of the claim. 29 U.S.C. § 626(f)(1)(F)(ii). This is the stage where the difference between the disparate treatment and disparate impact doctrine is crucial. Under the disparate treatment principle, statistics are, "admissable, but rarely determinative . . . and bad statistics alone will not suffice to prove pretext in individual disparate treatment cases."[25] Since many summary judgments in disparate treatment case. are rendered on the issue of pretext, the conclusion that

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[23] 29 U.S.C. § 626(f).

[24] *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259 (6th Cir. 1997).

[25] 1 Barbara Lindemann and Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 34, and note 131 (3d ed. 1996).

statistics cannot rebut the employer's claim means that the worker cannot obtain a trial on the merits. Applying this body of law to group terminations would frustrate the Congressional purpose discussed above.

This restriction on the function of statistics in individual cases, though followed by the lower courts, may be inconsistent with *McDonnell Douglas Corp. v. Green*.[26] This Court stated that,

> [S]tatistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. . . . The District Court may, for example, determine, after reasonable discovery, that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . " We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

If the employee cannot use the statistics that Congress has made available to make a prima facie case, the information about age distribution will not materially aid in making an informed choice between severance pay or litigation. The employee will have to rely on comparative information about individuals known to have been retained or terminated and his or her knowledge may be incomplete.

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[26] 411 U.S. 792, 805 (1973).

Only if the statistical information bears significantly on the question of employer liability can counsel give well grounded advice as to whether to take the money and waive ADEA rights. A reasonable estimate of the likelihood of discrimination cannot be made if plaintiff must prove disparate treatment. The Congressional purpose for requiring the production of the information can be implemented only under a doctrine that permits the worker to establish a prima facie case based on the statistics plus the information known to the employee. That is the "disparate impact" doctrine. It is highly unlikely that Congress would require employers to submit statistics to discharged workers that would not enable them to determine the "viability" of their ADEA claims.

The interposition of the disparate treatment doctrine in situations covered by OWBPA would frustrate the Congressional purpose in just the same way as the interposition of the common law of waivers into OWBPA which was rejected by this Court in *Oubre v. Entergy Operations, Inc.*, where Justice Kennedy pointed out that, "The rule proposed by the employer would frustrate the statute's practical operation as well as its formal command."[27] This was not allowed in *Oubre*; it should not be allowed here.

The 1990 Congress was no stranger to the disparate impact doctrine. In passing the Civil Rights Act of 1990 Congress spent enormous energy addressing the doctrine

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[27] 522 U.S. 422, 427 (1998).

and its implications under Title VII.[28] This act, which was vetoed by President Bush, would have restored the disparate impact doctrine after the *Wards Cove* decision. Yet the same Congress amended the ADEA to address the waiver issue without discussing the disparate impact doctrine.

This Congressional silence may, in the abstract, give rise to conflicting inferences. One is that members of Congress did not intend to introduce the doctrine under the ADEA, since they did not mention it, while they discussed the same concept intensively in the debate on Title VII, and knew "full well" how to include it, had they wished to do so.[29] The other inference is that they did not discuss it because they assumed that the doctrine applied to the ADEA. The assumption was reasonable because the substantive language of the ADEA is the same as Title VII; most Courts of Appeal and the EEOC had applied the disparate impact doctrine under the ADEA; and only one Justice – now Chief Justice Rehnquist – of this court had at that time expressed any doubt about the matter, in a case where this Court denied certiorari.

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[28] *See* Reginald C. Govan, *Honorable Compromises And The Moral High Ground: The Conflict Between The Rhetoric And The Content Of The Civil Rights Act Of 1991*, 46 Rutgers L. Rev. 1 (1993).

[29] *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir.), *cert. denied*, 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (1999); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir. 1995).

The reality is that Congressional attention in 1990 was focused on overruling specific Supreme Court and EEOC decisions. The disparate impact doctrine of Title VII had been watered down by the Wards Cove decision. Thus it attracted Congressional attention. There was no comparable Supreme Court decision concerning disparate impact under the ADEA. These different Title VII and ADEA issues were considered in separate statutes. It is difficult to determine which of the assumptions about Congressional intention is valid, under these complex conditions.[30] The Congressional intention does appear in the identification of a new class of workers subject to an "exit incentive or other employee termination program offered to a group or class of employees." These workers are provided with information and time to make a major life decision concerning the likelihood of age discrimination. Congress clearly distinguished between individual cases falling under the disparate treatment analysis, and the newly recognized affected group of terminated workers – the traditional basis for the disparate impact doctrine under Title VII, now explicitly recognized under the ADEA.[31] Only under the disparate impact doctrine will the statistics provide a solid basis for making the

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[30] The "post Hazen" cases (*see* note 28, *supra*) rejecting the disparate impact doctrine under the ADEA rely heavily on Hazen, even though Hazen explicitly declined to make such a blanket ruling. Hazen itself did not address the impact of the OWBPA on the original ADEA and thus cannot be authority, or even persuasive, on an issue that was not raised in Hazen itself.

[31] Alfred W. Blumrosen, *Modern Law: The Law Transmission System And Equal Employment Opportunity*, 79-83, 258-260 (Univ. of Wisconsin Press, 1993).

choice of suing or taking severance pay. Under the disparate impact doctrine, when a showing of such impact is made, the employer must demonstrate the legitimacy of its actions. Statistics showing such impact and evidence of the workers' situation suffice to survive summary judgment.

If the issue is to turn on the intention of the employer, the best that an attorney can do is speculate that something might turn up to prove the intent, and then advise the employee whether to gamble. The Committee Reports strongly suggest that the opportunity for a discharged worker to gamble was not the object of OWBPA.[32]

Requiring proof of intent in these cases would also produce an anomaly. Workers claiming age discrimination would have a more difficult time establishing discrimination in a downsizing than would workers suing over race, sex and national origin discrimination. But the ADEA is the only anti-discrimination statute where Congress has expressly sought to facilitate the evaluation of ADEA claims by requiring employers to produce statistics showing the effect of the program.

The prospects for discrimination on the basis of age in connection with a downsizing are at least as great as the prospects for race and sex discrimination. Yet requiring intent in age cases would make it more difficult for older workers to pursue discrimination claims than for

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[32] *See* Alfred W. Blumrosen, Ruth G. Blumrosen, Marco Carmignani, Thomas Daly, *Downsizing and Employee Rights*, 50 Rutgers L. Rev. 943, 953-956, 971-988 (1998).

minorities and women. This unlikely result reinforces the suggestion that Congress intended that employer liability in such "group exit or incentive" programs be based on disparate impact. Even if intent of the Congress that enacted the ADEA of 1967 was to prohibit only intentional discrimination, that should not control the interpretation of the 1990 Amendment concerning an issue that no one anticipated in 1967.

D. Many of the Same Factors That Suggest the Application of Disparate Impact in OWBPA Cases Also Suggest That Congress in 1990 Expected the Disparate Impact Doctrine to Apply in General under the ADEA

By 1990, there was substantial agreement among the lower courts and the EEOC that the disparate impact doctrine applied to the ADEA, and only one Justice of this Court had suggested otherwise. The Court itself had denied certiorari in 1981 on the same question. If there is to be any presumption about the assumptions that Congress made in 1990 about the issue, it surely must run in favor of the disparate impact principle. But Congress cannot legislate by an amendment that seeks to codify existing law without saying so. There must be tangible evidence of that intent. The tangible evidence in this case consists of the example given above concerning the interpretation of the waiver doctrine in light of the disparate impact principle to vindicate the clear intention that the statistics provided to discharged workers be sufficient to create a prima facie case, else they fail to provide

substantial grounds for the discharged worker's decision about whether to waive or litigate.

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